Supreme Court, U.S.
FILED
JAN 15 1958
JOHN T. FEY, Clerk

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 725

FREDA BILLS, *Petitioner*

vs.

THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

GEORGE S. McCARTHY
Fisk Medical & Professional Building
Amarillo, Texas
Attorney for Petitioner

January, 1958

Fort Worth Brief Printing Co., 619 So. Jennings Phone ED 2-4070

INDEX

	Page
CITATIONS TO OPINIONS BELOW	1
JURISDICTION	2
QUESTION PRESENTED	3
REASONS FOR GRANTING WRIT	6
CONCLUSION	7
APPENDIX A—MOTION AND ORDER OF DISMISSAL	1a
APPENDIX B— TRIAL JUDGMENT AND SENTENCE	3a
APPENDIX C—AFFIRMING OPINION	7a
APPENDIX D—DISSENTING OPINION	12a
APPENDIX E—REHEARING DENIAL	18a

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. .....

FREDA BILLS, *Petitioner*

vs.

THE STATE OF TEXAS

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF TEXAS

Your petitioner prays that a writ of certiorari issue to review the judgment of affirmance of the Court of Criminal Appeals of Texas entered in the above entitled case on June 29, 1957, and the order overruling the motion for rehearing entered on October 23, 1957.

CITATIONS TO OPINIONS BELOW

All opinions are unreported but are printed in the Appendix as follows: Appendix A, Motion and Order of Dismissal; Appendix B, Trial Judgment and Sentence; Appendix C, Affirming Opinion; Appendix D, Dissenting Opinion, and Appendix E, Rehearing Denial.

JURISDICTION

The judgment of the Court of Criminal Appeals of Texas was entered on the 29th day of June, 1957 (R. 688, Appendix C). Rehearing was denied on October 23, 1957 (Appendix E).

The jurisdiction of the Supreme Court is invoked pursuant to the Federal Constitution question, 28 USCA 1257 (3). The Federal Question was first raised in the trial court by a motion to dismiss the indictment complained of herein (R. 11). The Federal question was next raised in trial court (R. 297) and by motion for new trial (R. 36), and subsequently it was raised in the appellate court by the original record of exceptions preserved in the lower court, both formally and informally, by formal bill of exception (R. 42 to 71) and by informal bills of exception in the appeal to the Court of Criminal Appeals.

The grounds upon which it is contended that the Federal question is substantial are:

> (1) That the decision of the Court of Criminal Appeals in the affirming opinion did not consider the Federal questions raised in the lower court, to-wit, the Fifth and Sixth Amendments to the Federal Constitution and the Fourteenth Amendment, Section 1, of the Federal Constitution.

QUESTION PRESENTED

The petitioner was originally indicted under a separate indictment with one Bill Tyler, 288 SW 2d 517, and one Sidney Miller, 292 SW 2d 108. On October 26, 1955, your petitioner's case and the Miller

case were called for trial. Miller, under Article 651, V.A.C.C.P., asked that petitioner be first tried. The State's Attorney filed a motion to dismiss the petitioner's indictment (R. 52, Appendix A), and the District Judge entered an Order of Dismissal (R. 52, Appendix A), under date of October 26, 1955. On December 1, 1955, the petitioner was indicted again (R. 9), both indictments being in every respect identical, save and except the date of indictment. After the petitioner's motion to dismiss the second indictment was overruled (R. 20), the petitioner was tried and convicted under the second indictment (R. 33). The trial court overruled petitioner's motion for new trial (R. 38), and the appeal was perfected to the Court of Criminal Appeals of Texas.

The affirming opinion by Woodley, Judge (Appendix C), as well as the dissenting opinion, by Davidson, Judge (Appendix D), stated that the question raised in the appeal to the Court of Criminal Appeals by your petitioner has never been affirmatively passed on by the Court.

It is the contention of the petitioner that on the original dismissal by the trial court, making her available as a witness either for the States or the defendant, in the Miller case, supra, that the dismissal as entered by the District Court was final.

It is the contention of the petitioner that this application is not predicated on the interpretation of Article 653, V.A.C.C.P., which reads as follows.

> "The State's Attorney may, at any time, under the rules provided in this Code, dismiss a prose-

> cution as to one or more defendants jointly indicted with the others; and the person so discharged may be used as a witness by either party."

but that petitioner's contention is much more comprehensive in that in the dismissal of petitioner's original indictment which was final (R. 52, Appendix A), the re-indictment and re-trial violated Section 1 of the Fourteenth Amendment in that the State, in its testimony in chief, first introduced excerpts of petitioner's original testimony in the Miller trial, supra (R. 305-322), and subsequently in chief read all the testimony of petitioner, which your petitioner contends is in direct contravention of the due process provision of the Fourteenth Amendment, Section 1, as well as the Fifth Amendment to the Federal Constitution:

> "Nor shall any person be compelled in any criminal case to be a witness against himself."

It may be noted that your petitioner was deprived, on the 26th day of October, 1955, of the right of trial by the action of the District Attorney and the District Judge in contravention to Amendment Six of the Federal Constitution:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial."

The affirming opinion by Woodley, Judge, states, "Appellant was in no worse position when she testified at Miller's trial than she would have been had no indictment been returned against her." Judge David-

son, in the dissenting opinion:

> "I am of the opinion that the dismissal of the indictment against the appellant in order to defeat Miller's application for severance, was such an act on the part of the State as that it granted immunity to appellant against being tried for the offense alleged.
>
> "It is only by this reasoning that it be said that the State has not perpetrated a legal fraud upon this appellant.
>
> "Not only is that true, but when the State sat by and permitted this appellant to testify upon the trial of the case, it necessarily recognized that the dismissal of the indictment against her closed the matter insofar as again prosecuting for the offense charged therein."
>
> "In addition to all that, the State introduced and used against appellant to secure her conviction portions of the testimony which she gave upon the trial of the case against Miller, thereby capitalizing upon and using to its own benefit the situation it had brought about by dismissing the indictment to defeat the severance, and, in that manner, bringing about a situation which it could not otherwise have accomplished. In other words, had the severance been granted and appellant placed upon trial, as required, the State would not have been in possession of any prior testimony on the part of the appellant to introduce against her upon that trial."

Judge Davidson in his conclusion remarks:

> "It occurs to me that justice, in its most meager aspect, would demand of the State the dismissal of the indictment against the appellant, with immunity against further prosecution for

the offense therein charged, as the price to be paid for the right to try Miller and defeat the motion for severance. I respectfully dissent.

"Davidson, Judge."

REASONS FOR GRANTING WRIT

Your petitioner was indicted in Victoria County, Texas, and susequent to the indictment, when her case was called for trial, was ready for trial. The State of Texas, through its District Attorney, filed a motion to dismiss the indictment against the petitioner and the Court granted said motion and entered an order dismissing the case. Subsequently, the petitioner was re-indicted, was tried on the second indictment and convicted.

Aside from this procedure of re-indicting and trial, the testimony, in part and finally in whole, of the petitioner in the original trial of the Miller case, supra, when she was a witness called by the defendant, was used to aid the prosecution in the trial of the petitioner under the second indictment.

It is the contention of the petitioner that the record of this case will reflect that she has been deprived of the fundamental right of a fair and impartial trial by the State; that the deliberate act of the officials for the State of Texas prevented the petitioner from going to trial in a regular course when she was ready for trial, but the trial was delayed by the procedure of the State through its officials for some eleven months, in direct contravention to the Sixth Amendment to the Federal Constitution; that the procedure of the trial was such that she was not given a fair

and impartial hearing as provided in Section 1 of the Fourteenth Amendment, and finally, it is the contention of the petitioner that the record will also reflect that the procedure followed by the State directly caused the petitioner to be a witness against herself and was required to give evidence against herself by the State reproducing the testimony she gave as a witness in the Miller trial, after the indictment was dismissed, as testimony in chief in the trial against petition, in direct conflict with the safeguards provided this petitioner under the Fifth Amendment of the Federal Constitution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

GEORGE S. McCARTHY
Fisk Medical & Professional Bldg.
Amarillo, Texas
Attorney for Petitioner

Date: 14 January 1958

SERVICE

I, George S. McCarthy, attorney for the petitioner in the above entitled action, hereby certify that on the 14th day of January, 1957, I served the above Petition for a Writ of Certiorari upon Will Wilson, Attorney General for the State of Texas, and Leon Douglas, State's Attorney, by depositing a copy in the United States mails, postpaid, addressed to each of them at their offices at Capitol Station, Austin, Texas.

George S. McCarthy

APPENDIX A

"4"

No. 5815

In District Court,
Victoria County, Texas,
Fall Term, 1955.

THE STATE OF TEXAS

vs.

Freda Bills

Now comes the State, by the District Attorney, and moves the Court to dismiss the above entitled and numbered cause for the following reason, to wit:

For the reason that the said Freda Bills and one Sidney Miller, defendant in Cause No. 5812 in this Court, have filed a motion for severance asking that Freda Bills be tried first, and the State desires that the said Sidney Miller be tried at this time. This motion is made for this reason only and not because of insufficient evidence against the said Freda Bills.

s/ Wayne L. Hartman
District Attorney

"5"

ORDER OF THE COURT

On this the 26 day of October, 1955 came on to be heard the written motion of the State's Attorney filed herein, asking permission of the Court to dismiss this cause for the reasons, set out in said motion, to-wit, the filing by Sidney Miller, defendant in Cause No. 5812, of his motion that Freda Bills be tried first; and the same having been heard and duly

considered, the Court is of the opinion that the reasons so stated are good and sufficient to authorize such a dismissal.

It is, therefore, considered, ordered and adjudged by the Court, that this criminal action be and the same is hereby dismissed; that the State of Texas take nothing by this suit, and that the Defendant Freda Bills, be immediately discharged from any further liability in this cause, and that as to the same go hence without day.

s/ Howard P. Green
Judge District Court
Victoria County, Texas

THE STATE OF TEXAS
COUNTY OF VICTORIA

I, Pearl Staples, Clerk of the District Court within and for the County and State aforesaid, do hereby certify that the foregoing contains a true and correct copy of MOTION TO DISMISS AND ORDER in Cause No. 5812, of the State of Texas vs. Freda Bills, as the same appears of record in Volume 27, Page 224 of the Criminal Minutes of the District Court of Victoria County, Texas.

Given under my hand and seal of said Court in Victoria, Texas, this 16th day of March, A. D. 1957.
(Seal)

Pearl Staples, District Clerk,
Victoria County, Texas

By Mary Ponder Deputy

APPENDIX B (1)

JUDGMENT

No. 1581

IN THE 24TH DISTRICT COURT
OF
REFUGIO COUNTY, TEXAS

THE STATE OF TEXAS
VS.
FREDA BILLS

On the 14th day of January, 1957, this cause being called for trial, and the State appearing by her District Attorney, and the defendant, Freda Bills, appeared in person and by counsel, and both parties announced ready for trial, and the defendant having been arraigned in open court and having pleaded "not guilty" to the indictment herein, thereupon, a jury, D. L. Henry, and eleven others, was duly and legally selected, empaneled and sworn, who, having heard the indictment read and the defendant's plea of "not guilty," and having heard the evidence submitted, and having been duly charged by the court, retired in charge of the proper officer on the 16th day of January, 1957, to consider of the verdict, and thereafter, to-wit, on the 17th day of January, 1957, were brought into open court by the proper officer, the defendant and her counsel being present, and being asked by the Court if they had agreed upon a verdict, answered they had, and returned to the Court a verdict which was read aloud by the Clerk, and thereupon, the defendant asked that the jury be polled, and the name of each juror was then separate-

ly called, and each juror as his name was called was asked if the said verdict was his verdict and each of said jurors answered in the affirmative; whereupon the said verdict was received by the Court and is here now entered upon the minutes as follows:

> "We, the jury, find the defendant, Freda Bills, guilty of the offense charged in the second count of the indictment, to-wit: kidnapping for extortion and assess her punishment at 13 years in the penitentiary.
>
> D. L. Henry"

It is therefore considered and adjudged by the Court that the defendant, Freda Bills, is guilty of the offense of Kidnapping for Extortion, as found by the jury, and that she be punished as has been determined by the jury, that is, by confinement in the State Penitentiary for Thirteen (13) years, and that the said defendant, Freda Bills, be remanded to jail to await the further orders of this Court herein.

ENDORSED: NO. 1581 THE STATE OF TEXAS VS. FREDA BILLS ENTERED VOL. J. PAGE 546, MINUTES 24TH DISTRICT COURT, REFUGIO COUNTY, TEXAS.

APPENDIX B (2)

SENTENCE

NO. 1581

IN THE DISTRICT COURT
OF
REFUGIO COUNTY, TEXAS

THE STATE OF TEXAS
VS.
FREDA BILLS

On this the 25th day of January, 1957, this cause being again called, the State appeared by her District Attorney, and the defendant, FREDA BILLS, was brought into open court, her attorney being present for the purpose of having the sentence of the law pronounced in accordance with the verdict and judgment herein rendered against her on a former day of this term. And thereupon, the defendant, FREDA BILLS, was asked by the Court whether she had anything to say why said sentence should not be pronounced against her, and she answered nothing in bar thereof, whereupon, the Court proceeded in the presence of the said defendant, FREDA BILLS, to pronounce sentence against her as follows:

It is the order of the Court that the defendant, FREDA BILLS, who has been adjudged guilty of the offense of Kidnapping for Extortion and whose punishment has been assessed by the verdict of the jury at confinement in the penitentiary for thirteen (13) years, be delivered by the Sheriff of Refugio County, Texas, to the Superintendent of the Penitentiaries of

the State of Texas, or other persons legally authorized to receive such convicts, and the said FREDA BILLS shall be confined in said penitentiaries for not less than five (5) nor more than thirteen (13) years in accordance with the provisions of the law governing the penitentiaries of said State. And the said FREDA BILLS is remanded to jail until said sheriff can obey the directions of this sentence. But the defendant, FREDA BILLS, through her counsel, having duly in open court given notice of appeal to the Court of Criminal Appeals of the State of Texas, this sentence is hereby suspended until this appeal shall have been acted upon by the said Court of Criminal Appeals and the Mandate of that Court shall have been received and filed in this Court.

ENDORSED: NO. 1581 THE STATE OF TEXAS VS. FREDA BILLS SENTENCE ENTERED VOL. J, PAGE 547 MINUTES 24TH DISTRICT COURT REFUGIO COUNTY, TEXAS.

APPENDIX C

No. 29,085

FREDA BILLS, Appellant

vs.

THE STATE OF TEXAS, Appellee

APPEAL FROM
Refugio County

AFFIRMED

OPINION BY
Woodley, Judge

FILED IN THE COURT OF CRIMINAL APPEALS
Austin, Texas
June 29, 1957
Glenn Haynes
Clerk

No. 29,085

FREDA BILLS, Appellant

vs.

THE STATE OF TEXAS, Appellee

Appeal from Refugio County

OPINION

The offense is kidnapping for extortion; the pun ishment, 13 years.

Appellant and others were separately indicted for kidnapping Pete Rydolph.

The facts are substantially those set out in the ler. She testified upon her trial and her testimony in two companion cases; Tyler v. State, 288 S.W. 2d 517, and Miller v. State, 292 S.W. 2d 108; the appellant having testified as a witness for the defendant Miller. She testified upon her trial an dher testimony in the Miller case was offered by the State.

Appellant's bill of exception No. 1 relates to the dismissal of a prior indictment and the return of the present one subsequent to the Miller trial.

When Miller's case was called he filed affidavit for severance under Art. 651 V.A.C.C.P., requesting that Freda Bills be first tried, whereupon the State, desiring to try Miller, filed a motion to dismiss the charge by separate indictment against Freda Bills, the appellant herein. The court entered order dismissing said cause against Freda Bills on October 26, 1955.

Miller then proceeded to trial and Freda Bills, not

being under any charge or indictment, testified in Miller's behalf.

Thereafter, on December 1, 1955, the indictment upon which Freda Bills was tried and found guilty was returned, charging the same offense which was alleged in the prior indictment.

Appellant argues that the dismissal of the prior indictment was a subterfuge by the State to circumvent the severance statute; and that in law the dismissal of the prior indictment is conclusive and she could not be further prosecuted.

Appellant points to the fact that the question here presented has not been previously raised in behalf of the person whose case having been dismissed, testifies for a co-defendant and is subsequently indicted and convicted.

The purpose of Art. 651 V.A.C.C.P., one of the severance statutes, is to make the testimony of a co-defendant available to the defendant separately indicted for an offense growing out of the same transaction, who alleges under oath that such evidence is material for his defense and that he believes that there is not sufficient evidence against said co-defendant to secure his conviction.

When the testimony of the co-defendant is made available by the dismissal of all charges pending against him, and he is thus in position to testify the same as though no charges had ever been filed against him, the statute is satisfied.

Appellant filed no motion for severance, but com-

plains that she was denied the rights to which she was entitled under the dismissal because it was done for the purpose of placing Miller on trial first.

The right to have a charge dismissed as to one jointly charged with an offense, so as to enable another defendant to have the testimony of such party, is for the benefit of the party on trial and not the witness he seeks to have made available. Munoz v. State, 77 Tex. Cr. R. 545, 179 S.W. 2d 566.

Appellant was in no worse position when she testified at Miller's trial than she would have been had no indictment been returned against her.

Neither the defendant filing the motion for severance nor his co-defendant whose testimony is sought is entitled to have the co-defendant witness immune from further prosecution for the offense. Saucier v. State, 156 Tex. Cr. R. 301, 235 S.W. 2d 903.

The views of Judge Henderson in Brown v. State, 42 Tex. Cr. R. 176, 58 S.W. 131, cited by appellant, were not followed by the Court in that case nor in other cases, including Saucier v. State, supra.

The remaining ground for reversal relates to the reproduction of appellant's testimony given on Miller's trial.

The State first offered portions only of her testimony on the Miller trial. The trial judge concluded that the excerpts offered did not properly portray her testimony, whereupon the portions read were withdrawn and her entire testimony given at the Miller trial was read.

Appellant thereafter testified fully on the same matters and was subjected to a thorough cross-examination as to her testimony at the Miller trial.

Under the facts stated, we find no error in the reproduction of appellant's testimony given on the Miller trial.

The evidence sustains the conviction and we find no reversible error.

The judgment is affirmed.

(Delivered June 29, 1957.)

Woodley, Judge

APPENDIX D

No. 29,085

FREDA BILLS, Appellant

vs.

THE STATE OF TEXAS, Appellee

APPEAL FROM
Refugio County

DISSENTING
OPINION BY

DAVIDSON, Judge

FILED IN THE COURT OF CRIMINAL APPEALS
Austin, Texas
June 29, 1957
Glenn Haynes
Clerk

No. 29,085

Freda Bills, Appellant

v.

The State of Texas, Appellee

Appeal from Refugio County

DISSENTING OPINION

I am of the opinion that the dismissal of the indictment against appellant in order to defeat Miller's application for severance was such an act on the part of the state as that it granted immunity to appellant against being tried for the offense alleged.

It is only by this reasoning that it can be said that the state has not perpetrated a legal fraud upon this appellant.

All the cases cited by both the state and the appellant upon this question arose upon the objection of the person who was insisting upon the severance. I find no case where, as here, the state dismissed an indictment against one co-defendant in order to defeat the application for severance of another co-defendant and thereafter secured a new indictment against that person for the same offense charged in the indictment that was dismissed.

When the state dismissed the indictment against this appellant to secure an advantage over Miller which it could not otherwise have had, it granted appellant complete immunity, in my opinion, from prosecution for the offense charged in the indictment which was dismissed.

Not only is that true, but when the state sat by and permitted this appellant to testify upon the trial of the case it necessarily recognized that the dismissal of the indictment against her closed the matter in so far as again prosecuting for the offense charged therein.

In addition to all that, the state introduced and used against appellant to secure her conviction portions of the testimony which she gave upon the trial of the case against Miller, thereby capitalizing upon and using to its own benefit the situation it had brought about by dismissing the indictment to defeat the severance and, in that manner, bring about a situation which it could not otherwise have accomplished. In other words, had the severance been granted and appellant placed upon trial, as required, the stated would not have been in possession of any prior testimony on the part of the appellant to introduce against her upon that trial.

This, to my mind, is conclusive: When the state dismissed the indictment against appellant, it rendered her immune from prosecution thereafter for the offense charged in that indictment.

It is only by such conclusion that the state can and will be prevented from perpetrating a legal fraud on an accused and, at the same time, defeat the very purpose of the severance statute and the rights afforded thereby.

If the state can do what it has here done—that is, defeat the severance and at the same time incur no liability or relinquish no right in so doing, then the

old adage no longer exists which says that "You cannot eat your cake and have it, too," for that is exactly what the state would be here doing.

My views are in accord with those of Judge Henderson in his dissenting opinion in Brown v. State, 58 S.W. 131, at p. 134 (42 Tex. Cr. R. 176), wherein he said:

> "I do not deny that it is competent for the state to dismiss a prosecution pending as to one or more defendants jointly indicted with others, and, when such prosecution is dismissed, the person so discharged may be introduced as a witness by either party; but this is when the action of the court does not involve appellant's right to sever. In other words, whatever may be the construction placed on Article 709, the right of severance guaranteed in Article 707 cannot be frustrated by a simple dismissal of the case against the co-defendant. To test this matter, suppose that in answer to a motion to sever under Article 707 the district attorney should, with the approval of the court, dismiss the case against the co-defendant desired as a witness, and he should then be tendered as a witness to the co-defendant being tried, if he should decline to testify, on the ground his evidence might inculpate himself, what power would exist in the court to compel him to testify? Evidently none, and consequently the mere dismissal of the case against him would serve no useful purpose. Suppose he did not claim his privilege, but proceeded to give his evidence in the case, what guaranty would the co-defendant being tried have that, thus hampered and swearing, as it were, the halter around his neck, he would tell the truth, the whole truth, and

nothing but the truth? It occurs to me that Article 707 was intended to secure a right on behalf of a defendant who was indicted, either separately or jointly with others charged with the same crime; and that no other provision of the statute by judicial construction merely should be permitted to override and nullify the provisions of said article which were enacted for his benefit. If the construction placed on these articles by a majority of the court is sound, then the advantages guaranteed to a defendant, under the provisions of Article 707 are overridden by Article 709, and important rights guaranteed under the previous article are thus frustrated by a simple dismissal of the case against the co-defendant. If this can be done at all, it must be with the distinct guaranty that the co-defendant cannot be again prosecuted for the same offense which has been dismissed against him, and concerning which he is called upon to testify."

The articles (707 and 709) there referred to are presently Arts. 651 and 653, C. C. P.

In the Brown case the question of immunity was insisted upon by the party seeking the severance. Here, the party seeking to enforce immunity is the one who—as Judge Henderson says, with the "halter around (her) neck"—did testify fully and without hesitation, after the indictment against her had been dismissed, as a witness in the case, all with the consent and approval of the state.

It occurs to me that justice, in its most meager aspect, would demand of the state the dismissal of the indictment against appellant, with immunity

against further prosecution for the offense therein charged, as the price to be paid for the right to try Miller and to defeat the motion for severance.

I respectfully dissent.

(Delivered June 29, 1957.)

Davidson, Judge

APPENDIX E

CLERK'S OFFICE, COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

I, Glenn Haynes, Clerk of the Court of Criminal Appeals of Texas, at Austin, do hereby certify, in Cause No. 29,085.

FREDA BILLS, *Apellant*

versus

THE STATE OF TEXAS, *Appellee*

Appellant's Motion for Rehearing was overruled, without written opinion, on October 23, 1957.

WITNESS my hand and seal of said Court, this 6th day of January, A. D. 1957.

(Seal)

Glenn Haynes
Clerk, Court of Criminal Appeals